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OPINION | COMMENTARY

Warning to the Real-Estate Cartel

The Justice Department will take a new look at those outrageous brokers fees.

By Michael Toth

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A home for sale in Albuquerque, N.M., Jan. 25.

PHOTO: ADOLPHE PIERRE-LOUIS/JOURNAL/ZUMA PRESS

The Justice Department backed out last week of a proposed settlement with the National Association of Realtors to take a fresh look at the notoriously high commissions consumers pay real-estate agents. The move sent shock waves through the housing industry. The government occasionally brings an antitrust case and later decides to dismiss it. But never have federal antitrust authorities agreed to a proposed settlement only to back out after receiving public comment.

The real-estate lobby called the move “an unprecedented breach.” But there’s a much larger concern for legacy brokers than the novelty of the about-face. The signal from Washington is that antitrust enforcers are prepared to dismantle the collusive practices that burden U.S. homeowners with brokerage costs two to three times as high as in the rest of the developed world.

As authorities prepare a fresh inquiry, they should give close scrutiny to the bizarre way Americans pay real-estate agents. Unlike any other business, when a homeowner decides to sell, he must agree to pay two agents—his and the buyer's. It's a one-of-a-kind arrangement. The buyer agent is supposedly representing the buyer, yet is compensated by the seller. In other agency businesses, each client pays his own agent. If you want a white-shoe law firm to represent you, you can pay for one. But a local practitioner may do just as well, and clients have that option as well. The result is real price competition.

Real estate, by contrast, has a third-party payment system, which produces predictably inflated prices. Many home buyers would pay a lot less than 2.5% to 3% of the price of the home, the standard rate for buyer agents. Last year, 97% of buyers started their home search online, without the assistance of an agent.

Increasingly, home buyers are finding their next home first, and then contacting an agent second. But buyer agent fees can still be as high as $15,000 on the purchase of a $500,000 home because the buyer doesn't set the price of his agent. The seller does, and he's pressured to pay to the hilt.

A training manual from one of the nation's largest brokers lays it all out. It advises agents representing sellers to tell their clients to offer 2.5% to 3% to buyer agents. After all, "if an agent has 10 different houses, nine of which come with a 3% commission, one of which comes with a 2.5% commission, which one do you think they're going to show?" YouTube contains dozens more videos of similar training from other brokers and real-estate coaches. It's the way the industry operates and the principal reason real-estate commissions remain at pre-internet levels while transaction costs have hit the floor across the rest of the service economy.

The industry lobby has two defenses for the mandatory commission rules it established decades ago and continues to enforce. The first is that the arrangement has been around so long. But there's no easement under federal antitrust law for long-running violations. And unlike other current targets of antitrust scrutiny, holding the real-estate industry accountable requires no departure from the well-established consumer-welfare standard. Industry rules have created the most obvious consumer welfare harm—nosebleed prices.

Fans of the outmoded commission structure also claim there's solace in the fact that it's the seller who pays the agent fees because at least the buyer doesn't have to pay. That defies logic. When a home is sold, it's the buyer who pays. What industry defenders are

really saying is that buyers have the privilege of borrowing more money to pay for homes because the inflated cost of agent services are baked into the sale price.

The pandemic real-estate economy has been tough on aspiring home buyers. But help may be on the way.

Mr. Toth is general counsel of REX, a digital real estate startup based in Austin, Texas, which submitted a public comment recommending that the Justice Department back out of the settlement.

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